

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

NOTICE OF MARKET-DOMINANT
PRICE ADJUSTMENT

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Docket No. R2013-10R

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.
INITIAL COMMENTS IN RESPONSE TO ORDER NO. 2586
(August 17, 2015)**

Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc.
(hereinafter "Valpak") hereby submit these Initial Comments in response to Commission Order
No. 2586.

The Commission issued Order No. 2586 in response to the Court of Appeals' May 12,
2015 remand of part of Commission Order No. 1890 to "enunciate an intelligible standard"¹ to
determine when a Postal Service change in mail preparation requirements for mailers
constitutes a price change with price cap effects.

The Court of Appeals decision determining that the Commission has the authority to
regulate "mail preparation requirement changes with rate effects" upholds the Commission's
regulatory duty to prevent violations of the price cap established by the Postal Accountability
and Enhancement Act. *Id.* at 750. As Postal Service pricing is constrained by the price cap,
Congress understood that the Postal Service would be tempted to devise creative ways to
circumvent the price cap. Such circumvention could occur by reducing service levels,
imposing costly mail preparation requirements on mailers, or manipulating mail entry

¹ U.S. Postal Service v. Postal Regulatory Commission, 785 F.3d 740, 756 (D.C.
Cir. 2015).

requirements to force mailers into using more expensive rate cells. Congress entrusted the Commission with the duty to be vigilant to identify and then prevent the Postal Service from successfully employing such techniques.

A. The Commission's Proposed Four-Factor Analysis.

The Commission's Order identified four factors it proposes to evaluate to determine whether a mail classification change has "rate effects with price cap implications." Order No. 2586 at 3.

In response, the Postal Service demands that the Commission issue a "clear and well defined standard" in order to function under the price cap. *See* Motion of the United States Postal Service to Extend Comment Period (July 17, 2015). The Postal Service expresses "serious concerns" that the Commission's framework is "neither administrable nor consistent" with the Court of Appeals' decision. However, the truth is that the full panoply of possible changes to mail preparation requirements is too complex to be governed by a simple, bright-line test. There simply are too many mail preparation requirement and other changes that the Postal Service could devise, making impossible a one-size-fits-all test to be applied in every case. If the Postal Service wants uniformity, the only way to achieve it would be for the Commission to require all mail preparation changes to be presumed changes in rates unless demonstrated to have no rate effect whatsoever.

1. Factor One

The first factor — "whether the [mail preparation requirement] change alters a **basic characteristic** of a mailing" (emphasis added) — was the only factor on which the Commission based its decision regarding mandatory Full-Service IMb in Order No. 1890. The Court of

Appeals did not disallow that factor as being a legitimate consideration, but simply viewed it standing alone to be insufficient. The Court of Appeals explained, “This purported standard does not come close to satisfying the requirement of reasoned decisionmaking, most notably because the reference to a ‘basic characteristic of a mailing’ has no content and is not accompanied by an adequate explanation of how the standard applies to the facts of this case.” U.S. Postal Service at 754. The Commission corrects this court-identified weakness, in part, by specifying that the content of factor one include, *inter alia*, changes in the “size, weight, or content of eligible mail,” changes in the “presentation and/or preparation of the mailing,” and the magnitude of any changes. Order No. 2586 at 4.

Proposed characteristic (b) in the first factor is “whether the change alters the presentation and/or preparation of the mailing in a substantial way.” *Id.* Although the Postal Service might prefer the Commission to quantify “substantial,” one can understand how difficult it would be to devise a numerical standard. The Commission’s characteristic could be revised to read: how substantially does a change alter the presentation or preparation of a mailing? Such a modification would make this characteristic parallel to characteristics (d) and (e), which focus on the magnitude and complexity, respectively, of a change, not whether it attains a prescribed level of magnitude or complexity.

However, proposed characteristic (c) — “regularity of the change (periodic vs. one-time)” — is confusing and should be explained or deleted.

2. Factor Two

The first component the Commission identifies for the second factor — the **effect of a change on mailers** — is “whether the change imposes fixed or variable costs.” This

component could be simplified to “whether the change imposes new costs” on mailers. The imposition of costs on mailers is a significant matter. However, as proposed by the Commission, the use of the terms “fixed” or “variable” might distract from the basic question. Further, the extent of fixity or variability could be different for each mailer, and likely would be unknown to both the Postal Service and the Commission.

The remaining components of the second factor identified are key questions in the Commission’s analysis of mail classification changes.

3. Factor Three

The third factor inquires into the **purpose** of a proposed mail preparation change. Although the purpose of some changes might not be clear, and although it may be a relevant inquiry, it should not be necessary for the Commission to read the mind of Postal Service management and attempt to divine their actual purposes in order to decide whether a proposed change constitutes a price change. The effect of a change is much more important than the Postal Service’s subjective purpose.

4. Factor Four

The Commission explains that the fourth factor will take into account “whether the change results in a **shift in volume** of mail from one rate category to another.” Order No. 2586 at 4 (emphasis added). This is an important factor that is forward-looking, but one that potentially is in conflict with the current requirement that the billing determinants be based on historic volume data. The Commission should clarify that it is important for the Commission to evaluate how mailers can be expected to respond to a change.

In conclusion, with the improvements proposed above, the four-factor analysis presents a good initial step towards a framework to evaluate whether mail classification changes would have a price cap effect.

B. Mandatory Full-Service IMb Meets the Commission's Test.

The Court of Appeals remanded the case to the Commission, not only to “enunciate an intelligible standard” but also to “reconsider its decision in light of that standard.” *Id.* at 756. Specifically, the Court of Appeals found that Order No. 1890’s determination was “not accompanied by an adequate explanation of how the standard applies to the facts of this case.” *Id.* at 754. Order No. 2586 makes no effort to perform that reconsideration, only setting out the new four-factor analysis and asking for comments “on the four factors listed above and their components” while stating that “the Commission intends to apply these factors to the Full Service IMb requirements in the decision on remand.” *Id.* at 4-5. There is no reason to believe that mandatory Full-Service IMb that the Postal Service proposed in conjunction with Docket No. R2013-10, when viewed under the Commission’s proposed framework, would lead to a different conclusion.²

² The Court of Appeals addressed the Commission’s apparent inconsistency in Order No. 1890 in treating the new FSS preparation requirements, particularly the bundling requirement for certain flat-shaped mailpieces. Although the Court of Appeals did not require this issue to be reconsidered on remand, application of the Commission’s new framework to the FSS preparation requirements addressed earlier in Order No. 1890 (at 71-72) might be at least instructive, perhaps wise, and might result in a Commission determination that those requirements in fact have an impact on the price cap calculation.

Respectfully submitted,

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